United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-2029

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

-against- : Docket No. 75-2029

ELLEN GRUSSE and MARIE THERESE TURGEON :

Witness-Appellants. :

----------x

PETITION FOR REHEARING AND REQUEST FOR REHEARING EN BANC

KRISTIN BOOTH GLEN
30 East 42nd Street
New York, N. Y. 10017

MICHAEL AVERY
265 Church Street
New Haven, Connecticut 06510

DAVID N. ROSEN
265 Church Street
New Haven, Connecticut 06510

ATTORNEYS FOR WITNESS-APPELLANTS

ORIGINAL

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UNITED STATES COURT OF APPEALS
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Appellee,	:	
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PETITION FOR REHEARING AND
REQUEST FOR REHEARING EN BANC

PRELIMINARY STATEMENT

This is a petition for rehearing and request for rehearing en banc of a decision rendered by this Court[1] (Timbers and Lumbard, C.C.J., Oakes, C.J., dissenting) on February 27, 1975, affirming a decision of the United States District Court for the District of Connecticut (Newman, J.)

[1] For the convenience of the Court, the decision is attached hereto as Appendix A. Citations will, however, be to the page number of the slip opinion as it is reproduced there.

holding the Appellants in civil contempt for their failure to answer questions put to them by a grand jury.

Because Appellants believe that this Court's decision was reached with inordinate haste and without adequate time for consideration of extremely serious issues[2] and because the "necessity" for such haste is now past[3], they are respectfully constrained to request a rehearing of the several issues they have previously raised.

Further, they believe that the instant decision is in direct conflict with decisions of other panels of this Circuit and with controlling decisional law of the Supreme Court, and that, accordingly, it presents questions of sufficient importance to require en banc consideration by the entire court.

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[2]At their argument for bail and/or stay pending appeal on February 25, Appellants were directed to argue the appeal on the merits two days later, on February 27 at 2:00 P. M. Appellants' briefs were to be filed by 9:00 A. M. that morning, and the Government's briefs were due at argument. The same panel heard other arguments in the morning, clearly allowing inadequate time for consideration of Appellants' complex forty-seven page brief. Almost immediately following the argument, all three members of the panel read their decisions.

[3]After a stay pending application for certiorari was denied by Justice Marshall on March 5, Appellants surrendered to the marshalls and were taken to prison where they will now apparently remain for the life of the grand jury. Whatever "disruption" of the grand jury's proceedings might have occurred as a result of somewhat longer deliberation is now clearly no longer an issue.

The points of law or fact which, in the opinion of Appellants, the Court "has overlooked or misapprehended" (Fed. Rules App. Proc. Rule 40 [a]) are as follows:

> 1. Once an allegation of illegal electronic surveillance has "triggered" 18 USC §3504, a government "denial" which is subsequently shown to be inadequate and untrue cannot be deemed "an end to the matter."
>
> 2. The Court's extension of the limiting rule of U. S. v. Persico, 491 F.2d 1156 (2d Cir. 1974) cert. den. 43 USLW 3240 (Oct. 21, 1974) was unwarranted, inapposite and in complete conflict with both prevailing Supreme Court decisional law and with the language and rationale of the Persico case itself.

These two points[4] will be considered briefly seriatim.

I. An Overly Limited and Factually Untrue "Denial" of Electronic Surveillance Does Not Satisfy the Requirements of 18 USC §3504

These, briefly, are the relevant facts:

The Appellants were called before the grand jury, took the Fifth Amendment, were given immunity and ordered to testify. They refused to answer on the grounds, inter alia, that the grand jury questions were the product of illegal

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[4] Appellants in no way intend to abandon the grand jury abuse point which they raised on appeal, See Appellants' Brief at pp. 17-33, and specifically request that should rehearing and/or rehearing en banc be granted, the issues there argued be fully considered.

electronic surveillance[5] of themselves, their premises, and their attorneys.[6] The Assistant United States Attorney submitted an affidavit disclaiming such surveillance and claiming to have "inquired of the appropriate federal authorities," but upon examination at the contempt hearing admitted that he had only spoken with one FBI case agent in Connecticut, and that no other agencies had been inquired of.

The District Court's conclusion that this "denial" was adequate, apparently affirmed by two judges of this Court[7] is in violation of previous decisions of this Circuit, and with applicable decisions of the Supreme Court. Further, the decision in the instant case adds to the general welter of confusion which now surrounds §3504 in this Circuit[8] and only en banc consideration and resolution of this issue can provide

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[5]Such an allegation, if true, is an absolute defense to a civil contempt. Gelbard v. U. S., 408 US 41 (1972).

[6]Somewhat different allegations are required to adequately raise each of these claims; in the instant case all were made in accordance with the prevailing decisional law. See Appellants' brief at pp. 12-13, and the Court's opinion raises no question as to this fact.

[7]The majority opinion of Judge Timbers simply does not deal with the issue, except obliquely by affirming on the decision below. Judge Lumbard's concurrence does, but in a way which we believe is entirely wrong, see infra.

[8]A similar issue has been raised in a Petition for Rehearing and Rehearing En Banc in U. S. v. Aloi, Docket No. 74-1220, presently sub judice before this Court.

the necessary guidance for District Court judges facing the problem in the future.

The Circuits themselves are in conflict as to what constitutes an adequate "denial" under §3504; compare, e.g., U. S. v. Alter, 482 F. 2d 1016 (9th Cir. 1973), Beverly v. U. S., 468 F. 2d 732 (5th Cir. 1972), In re Horn, 458 F. 2d 468 (3rd Cir. 1972), and In re Marx, 451 F. 2d 466 (1st Cir. 1971).[9]

In this Circuit, one panel has ruled that once an allegation of illegal electronic surveillance has been made, the prosecutor is required

> "...to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked and extending the denial not only to conversations of (appellant) but also to conversations of anyone else occurring on premises owned, leased or licensed by (appellant)." U. S. v. Toscanino, 500 F. 2d 267, 281 (2d Cir. 1974).

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[9]These cases differ on such issues as whether the denial must be in affidavit form, must list the agencies checked, must include information about how the agencies were checked and whether inquiry was made as to third party taps in apparent violation of Alderman v. U. S., 394 US 165 (1969).

Another has apparently ruled[10] that a post-trial letter, listing agencies, will suffice, See U. S. v. Alci, supra, decided January 31, 1975; and the instant panel apparently holds that inquiry of one FBI agent is adequate.[11] This obvious conflict clearly requires resolution.

In addition, the reasoning of the concurrence dangerously ignores both the sordid history of inadequate government denials in this and other Circuits[12] and two lines of Supreme Court cases which were not argued in appeal.[13]

Judge Lumbard found the admitted failure to check enumerated governmental agencies inconsequential because,

> "I think that the assistant United States attorney handling a case and the FBI agent in charge of the investigation of a case are the two people most likely to know if the fruits of any electronic surveillance were used to gain information on which the grand jury would base its questions. Thus, I think that the denial was sufficient." Concurring opinion of Lumbard, J. (Slip op. at pp. 2042-43) (Footnotes omitted)

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[10]The opinion makes no mention of the fact that the denial was in letter form, and received approximately a week before oral argument on appeal, but these facts were fully presented to the court and known to it.

[11]The particularly compelling reasons for inquiries to other agencies, including the CIA in the instant case, are fully set forth in Appellants' brief at pp. 4-7.

[12]This list, including, of course, U. S. v. Smilow, 472 F. 2d 1193 (2d Cir. 1974) is too lengthy and too familiar to be repeated here. See Appellants' brief at p. 7.

[13]The argument adopted in the concurrence was not made by the government in its briefs.

This is incorrect for two reasons.

First, the determination of whether the "fruits of any electronic surveillance were used" is one to be made by a court, after an adversary proceeding, and not by a prosecutor. Such hearing and determination occur only after the prosecutor has supplied all information concerning the illegal surveillance. Alderman v. U. S., supra at pp. 182-183.

Second, decisions in the Supreme Court have repeatedly acknowledged that an individual representative of a governmental agency cannot possibly be aware of all illegal electronic surveillance which may have been caused by his own, O'Brien v. U. S., 386 US 345 (1967) (per curiam) (sep. op. of Harlan, J.)[14] or other agencies Black v. U. S., 385 US 26, 30 (1966) (per curiam) (sep. op. of Harlan and Stewart, J. J.)[15] C.f. Giglio v. U. S., 405 US 150 (1972).

To sustain a "denial" as factually inadequate as that in the instant case is to ignore the rule of Alderman, the teaching of O'Brien and Black, and most significantly, to

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[14] In O'Brien the FBI report did not contain an indication of the illegal monitoring performed by FBI agents and recorded in their logs, and neither the case agent nor the prosecuting attorney were aware of its existence.

[15] In Black the prosecution was carried out by Justice Department attorneys in the Tax Division, who were unaware of illegal FBI tapping of the defendant.

undermine the clear congressional intent of 18 USC §2515 and §3504 as set forth by the Supreme Court in Gelbard, supra.[16]

II. The Application of In re Persico to a Witness's Claim of Illegal Electronic Surveillance Violates that Decision Itself, Undermines the Statutory Scheme Set Forth in 18 USC §2515 and 18 USC §3504 and Violates Gelbard v. U.S.

Both this Court and the District Court held that the witnesses were not permitted to go behind the government's entirely inadequate denial of illegal electronic surveillance because of the

> "strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons" (Circuit Ct. op. p. 3) citing U. S. v. Persico, 491 F. 2d 1156 (2d Cir. 1974) cert. den., 43 USLW 3240 (Oct. 21, 1974)[17]

The application of the Persico rationale is in direct contradiction to Persico itself, violates §2515, §3504 and the Supreme Court's Gelbard decision in several ways.

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[16] The Court found that the purpose of §2515 is a strong exclusionary rule against unauthorized wiretaps which "recognizes the responsible part the judiciary must play in supervising and interceptions of wire communications to protect the privacy of innocent persons." Gelbard, supra, citing S. Rep. No. 1097, 90th Cong. 2d Sess. 89 (1968).

[17] In Persico the grand jury witness refused to answer questions based upon Court ordered electronic surveillance and sought a hearing on whether the admitted interceptions of his conversations were conducted in violation of Chapter 119 of 18 USC. Noting that in Gelbard this Court left open the question "whether (witnesses) may refuse to answer questions if the interceptions of their conversations were pursuant to court order" Gelbard, supra, at p. 61, n. 22, Persico, at p. 1160, the Circuit answered the question in the negative.

A. Conflict With Prior Decisions of this Court

First, until the instant case, no Court has suggested that the denial of unlawful electronic surveillance required by 18 USC §3504 may be less responsive, explicit or comprehensive when a claim is made by a grand jury witness than in other contexts contemplated by the statute. The face of the statute itself suggests no basis for a variable standard; it refers alike to

> "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulator body, or other authority of the United States..." 18 USC §3504.

Persico, by contrast, construed 18 USC §2515 (10) (a), a provision which excludes grand juries from the bodies before which motions to suppress may be made. The statutory scheme suggests, contrary to the holding of the District Court, that while the bases for suppression of evidence may be more limited in the grand jury than in other contexts, the right to either an admission or an adequate denial of electronic surveillance is not.

The more crucial distinction, however, is that the Court in Persico very specifically confined its decision to the situation where the government admitted prima facie legal

tapping[18]--a situation which is hardly the case here.

The opinion in Persico itself concludes that its rationale cannot apply, as here

> "When the government concedes that the electronic surveillance was unlawful or when the invalidity of the surveillance is patent, such as, for example, when no court order was obtained..." Persico, supra, at 1161.

The conflict between the instant decision and the Persico rationale thus requires rehearing en banc for its speedy resolution.

B. Conflict With Gelbard and Applicable Statutory Provisions

As the Supreme Court recognized in Gelbard, the purpose of §2515 is as a strong exclusionary rule for wiretaps unless "authorized by a Court of competent jurisdiction." Gelbard, supra, at p. 47.

The Circuit and District Courts' equation of alleged illegal, warrantless electronic surveillance with Court ordered tapping is thus clearly in conflict with the Supreme Court's interpretation of §2515, as well as with applicable general

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[18]The case cited in the concurring opinion of Judge Lumbard, In re Mintzer (1st Cir., No. 74-1388, Dec. 26, 1974) is similarly distinguishable, although in that case it also appears that very extensive information as to the tapping was given by the Government and considered by the District Court.

principles of the Fourth Amendment, See e.g., Gerstein v. Pugh, _____ US _____, 43 USLW 4230 (Feb. 18, 1975).[19]

In essentially refusing a witness her or his rights to an adequate denial of illegal electronic surveillance, the instant opinion also ignores the Supreme Court's exegesis of §3504. That Court held that §3504

> "...actually places or codifies a burden upon the Government, rather than the defendant." Gelbard, supra at p. 56.

This Court's fear of the possible "disruption" of grand jury proceedings totally ignores, that in enacting §3504 Congress determined that a certain amount of "disruption" was not only permissible but actually required to protect the

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[19] In this case, unlike Persico, there has been no evaluation of the allegedly illegal wiretapping by a neutral and detached magistrate, See dissenting opinion of Judge Oakes, slip. op. at p. 2045. As the Supreme Court recently wrote in Gerstein,

> "...in Coolidge v. New Hampshire, 403 US 449-453 (1971), (we) held that a prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. We reaffirmed that principle in Shadwick v. City of Tampa, 407 US 345 (1972), and held that probable cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution. See also United States v. U. S. District Court, 407 US 297, 317 (1972)." Gerstein, id. at 4234-35.

rights of privacy it was bent on insuring.[20]

Further, once Congress has placed the potentially disruptive "burden" of affirmance or denial on the government, there is no reason to believe that that disruption will be greater if an adequate, rather than inadequate denial is made.[21]

Finally, because Gelbard holds that the existence of illegal electronic surveillance constitutes a defense to a grand jury contempt citation, the Government may not constitutionally deprive the witness of her or his defense by filing an inadequate denial. C.f. In re Green, 369 US 689 (1962).[22] So long as there is a possibility that illegal

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[20] It must be remembered that we are here dealing with statutory, not Fourth Amendment rights, a fact which makes the District Court and concurring opinion citations of U. S. v. Calandra, 414 US 338 (1974) entirely inapposite.

[21] This entire litigation would have been avoided had the government made such an "adequate" denial in the first instance. This, of course, presupposes that the standards for such "adequacy" are clear, and provides another reason for requiring en banc consideration.

[22] In Green, a contempt conviction in a state court without a hearing and without the opportunity to establish a legal defense was held to violate the due process clause of the Fourteenth Amendment.

electronic surveillance has occurred[23] the Government is potentially depriving the witness of exculpatory materials whose production is required by, e.g., Brady v. Maryland, 373 US 83 (1963).

For all of these reasons, the entirely inapposite application of the Persico rule works a dangerous departure from Congress's purpose in enacting §2515 and §3504, and controverts the Supreme Court's holding in Gelbard, supra. requiring rehearing, rehearing en banc, and reversal of the decision below.

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[23]As there clearly is in the instant case, See Appellants' brief at pp. 6-8.

CONCLUSION

For all of the above reasons, the Appellants' Petition should be granted, rehearing en banc ordered, and the contempt citations below vacated.

Respectfully submitted,

Kristin Booth Glen

KRISTIN BOOTH GLEN
Attorney for Appellant
Marie Theresa Turgeon
30 East 42nd Street
New York, New York 10017

David N Rosen (KBG)

DAVID N. ROSEN

Michael Avery (KBG)

MICHAEL AVERY
Attorneys for Appellant
Ellen Grusse
265 Church Street
New Haven, Connecticut 06510

Dated: New York, New York
New Haven, Connecticut
March 13, 1975

APPENDIX A

Opinion of Court, dated February 27, 1975.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 857—September Term, 1974.

(Argued February 27, 1975 Decided February 27, 1975.)

Docket No. 75-2029

UNITED STATES OF AMERICA,

Appellee,

v.

ELLEN GRUSSE and MARIE THERESA TURGEON,

Appellants.

Before:

LUMBARD, OAKES and TIMBERS,

Circuit Judges.

Appeal from orders entered in the District of Connecticut, Jon O. Newman, *District Judge,* adjudicating appellants in civil contempt for refusing, after having been granted use immunity, to answer questions before a federal grand jury.

Affirmed.

KRISTIN BOOTH GLEN, New York, N.Y. and MICHAEL AVERY, New Haven, Conn. (David N. Rosen, New Haven, Conn., on the brief), *for Appellants.*

WILLIAM F. DOW, III, Asst. U.S. Atty., New Haven, Conn. (Peter C. Dorsey, U.S. Atty.,

New Haven, Conn., on the brief), *for Appellee.*

TIMBERS, *Circuit Judge:*

Ellen Grusse and Marie Theresa Turgeon appeal from orders entered February 19, 1975 in the District of Connecticut, Jon O. Newman, *District Judge,* adjudicating them in civil contempt, pursuant to 28 U.S.C. §1826(a) (1970), for refusing to answer questions before a federal grand jury after having been granted use immunity pursuant to 18 U.S.C. §§6002-03 (1970). They were remanded to the custody of the United States Marshal until they purge themselves of their contempt, but in no event is their custody pursuant to the instant contempt orders to extend beyond the term of the present grand jury which expires April 1, 1975. On this expedited appeal, we affirm.

The grand jury is investigating possible violations of federal laws in the District of Connecticut by individuals who may have assisted two fugitives who are charged in an indictment in the District of Massachusetts with participation in a bank robbery in which a police officer was shot and killed.

Appellants were first called as witnesses before the grand jury on January 28, 1975. During the period of one month from that date until today, February 27, appellants have been represented continuously by counsel. The sequence of proceedings in the district court is a matter of record as set forth in Judge Newman's opinion, upon which we affirm.

The case first was brought to the attention of our Court on February 20 when appellants filed a motion for a stay of the district court orders or for bail pending appeal. The stay which had been granted by the district court was continued by another panel of our Court until February 26.

Appellants' motion for a stay or bail was heard by the present panel (Judges Lumbard, Oakes and Timbers) on February 25. We continued the stay until we could hear the appeal on the merits. We expedited the appeal and heard it today. We have carefully considered the briefs, the record and the able arguments of counsel on both sides.

We affirm the orders of the district court essentially on three grounds: the statute, 28 U.S.C. §1826 (1970); our recent decision in *United States* v. *Persico*, 491 F.2d 1156 (2 Cir. 1974), *cert. denied*, 43 U.S.L.W. 3240 (U.S., October 21, 1974); and the excellent district court opinion of Judge Newman herein dated February 19, 1975.

First, the starting point necessarily must be the strong public policy reflected in the statute itself. We noted the legislative history in our recent opinion in *Persico, supra*, 491 F.2d at 1161, and particularly the "Congressional concern over disruption of smooth and efficient operation of the grand jury system". *Id.*

Second, our decision in *Persico* is controlling on the fundamental issue here involved. While there is a factual variation between *Persico* and the instant case, in our view the present case is an even more compelling one for adhering to the strong public policy of this Circuit of not permitting disruption of grand jury proceedings absent compelling reasons. We find no such compelling reasons here. See *United States* v. *Calandra*, 414 U.S. 338 (1974); *Gelbard* v. *United States*, 408 U.S. 41, 70 (1972) (concurring opinion of Mr. Justice White).

Third, the excellent opinion below of Judge Newman is a striking example of the balancing by a conscientious and comprehending district judge of the interests of the appellants as witnesses before the grand jury, on the one hand, and, on the other, of the public interest. We hold that the district court's findings are unassailable and we agree with the district court's conclusions.

We affirm the contempt orders of the district court on the opinion of Judge Newman, —— F.Supp. —— (D. Conn. 1975), and we vacate the stay of those orders heretofore entered by this Court.

Affirmed.

LUMBARD, *Circuit Judge* (concurring):

I concur.

The only real issue I see here is the sufficiency of the government's denial that it directly or indirectly relied on electronic surveillance in formulating the questions asked of appellants before the grand jury. That denial consisted of two parts—the affidavit submitted to the district court and the testimony of the assistant United States attorney before that court. While the affidavit itself was probably insufficient under the standards we set down in *United States* v. *Toscanio,* 500 F.2d 267, 281 (1974), because it failed to list the government agencies that had been checked, that insufficiency was cured when the assistant testified before Judge Newman that he had checked with the FBI agent in charge of the investigation in this case.

It must be remembered that any electronic surveillance by the government is relevant only if it is somehow used in formulating questions that the grand jury intends to ask. Thus, surveillance conducted by the government, the results of which were not known to the agents investigating this case, would not be relevant. In light of these considerations I think that Judge Newman was correct in finding that the affidavit was sufficient. I think that the assistant United States attorney handling a case and the FBI agent in charge of the investigation of a case are the two people most likely to know if the fruits of any electronic surveillance were used to gain information

on which the grand jury would base its questions.[1] Thus, I think that the denial was sufficient.[2]

Section 3504 must be construed so that investigations by the government conducted through grand juries may be conducted with appropriate speed, while at the same time adequately protecting the rights of witnesses. To interpret the section as urged by appellants would unduly impede and delay the grand jury's investigation as it would allow a witness to thwart the operation of the grand jury by requiring that its proceedings cease while a district court undertakes an extensive investigation of the government investigators who are investigating the witness. I cannot believe that the Congress intended that section 3504 be given such an interpretation. I think that Judge Newman correctly balanced the competing interests involved here. See, e.g., *In re Mintzer*, No. 74-1388 (1st Cir. Dec. 26, 1974). See generally *Calandra* v. *United States*, 414 U.S. 338 (1974).

Thus, I concur in Judge Timbers' opinion.

OAKES, *Circuit Judge* (dissenting):

I dissent.

Appellants' affidavits were sufficient to "trigger" 18 U.S.C. § 3504, thereby requiring the prosecutor specifically

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1 While it might be a salutory practice for the government to make further inquiries than it did here, if only to preclude the attack made here, I do not think that the law requires such further inquiries. *In re Mintzer*, No. 74-1388, at 3 n.2. (1st Cir. Dec. 26, 1974).

2 Appellants cite an example of a broader affidavit used in the Southern District and suggest it as an example to be followed. In addition to the FBI, that affidavit covered the Secret Service, Internal Revenue Service, Bureau of Alcohol, Tobacco and Firearms, Customs Service, Drug Enforcement Administration, and the Postal Service. I do not understand the connection between the appellants or their lawyers in this case and counterfeiting, threats on the President's life, unpaid taxes, bootlegging, firearms violations, smuggling, drug abuse or mail-related offenses.

to check appropriate agencies, *United States* v. *Toscanino*, 500 F.2d 267, 281 (2d Cir. 1974), and to be able to inform the court specifically of the results of his search. Here the search to uncover electronic surveillance was inadequate. *See United States* v. *Aloi*, No. 74-1220 (2d Cir. Jan. 31, 1975), slip op. 6057, 6086; *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972).

The inadequacy of the Government search is underscored when viewed against the substantial efforts necessarily exerted in obtaining the adjudication of contempt here. The witnesses were first called before the Grand Jury on January 28, 1975; after the granting of immunity, they were recalled on February 13. It was not until February 19, 1975 that the appellants were finally held in contempt. In the light of the three weeks during which this matter was pending the United States Attorney's Office certainly could have communicated with the appropriate government agencies in order fully to safeguard the rights of these appellants. I am not talking about a time consuming adversarial investigation of government agencies which might hamper the work of the grand jury. I would require only an affidavit evidencing the fact that the prosecution was reasonably diligent in its search for possible illegal wiretaps.

The failure of the prosecutor to make at the very least a so-called "eight agency search" [1] for possible electronic surveillance may be a result of an uneasiness about what the search might uncover. Instances in this and other courts of denials by the government that any such surveillance took place, later replaced by retractions, emphasize the need for stricter safeguards in this area. *United*

1 This would include the Federal Bureau of Investigation, the United States Secret Service, the Internal Revenue Service, The Bureau of Alcohol, Tobacco & Firearms, The Customs Service, The Drug Enforcement Administration and the Postal Service.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANCES PAOLINI, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 263 East 235th Street, Bronx, New York, 10470.

On March 13, 1975, deponent served the attached Petition for Rehearing and Rehearing En Banc upon WILLIAM DOW III, United States Attorney's office, attorney for Appellee in this action, at Federal Building, ~~of~~ New Haven, Connecticut 06501, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in--a post office--official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Frances Paolini

Frances Paolini

Sworn to before me on
March 13, 1975.

Kristin Booth Glen

Notary Public

KRISTIN BOOTH GLEN
Notary Public, State of New York
No. 31-9820460
Qualified in New York County
Certificate filed in New York County
Commission Expires March 30, 1976

States v. *Smilow*, 472 F.2d 1193 (2d Cir. 1973). *Cf. In re Tierney*, 465 F.2d 806, 813 (5th Cir. 1972); *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971).

In re Persico, 491 F.2d 1156 (2d Cir. 1974), is inapplicable because there the Government had acknowledged the existence of electronic surveillance but had submitted three court orders under which the surveillance had been conducted. Thus, the appellant in *Persico* was asking the court to look behind the legality of court ordered surveillance in a civil contempt pursuant to 28 U.S.C. § 1826(a) and to suppress the fruits of the surveillance under 18 U.S.C. § 2518(10)(a), a statute which does not include grand juries. There the court orders had given Persico the protection of the judgment of a "neutral and detached magistrate." *Cf. Gerstein* v. *Pugh*, 43 U.S.L.W. 4230, 4233 (U.S. Feb. 18, 1975).

Here, appellants had requested the Government to affirm or deny the existence of surveillance under 18 U.S.C. § 3504 which specifically includes grand juries. The insufficient search for electronic surveillance leaves open the possibility that surveillance had taken place, thus potentially depriving appellants of their rights under *Gelbard* v. *United States*, 408 U.S. 41 (1972), to challenge questions derived from illegal surveillance.

I would remand for a hearing at which the Government would have the opportunity to present a *specific* denial of electronic surveillance.